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In the Supreme Court of the United States

OCTOBER TERM, 1957

VICTOR H. FALL, one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and BRUCE W. SANBORN, *Petitioners,*

vs.

ALEXANDER B. JOHNSTONE, *Respondent.*

Petition for Writ of Certiorari

TO THE SUPREME COURT OF MONTANA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above cause on November 14, 1957, which became final on the denial of a timely petition for rehearing filed by the petitioner Fall, denied December 4, 1957, which judgment was rendered in an original proceeding seeking a writ of supervisory control or other appropriate writ. A peremptory writ of prohibition was issued on December 10, 1957, pursuant to an order issued on said date by the Supreme Court of Montana.

OPINION BELOW

The opinion of the Supreme Court is found in the Appendix p. 1-11, and not yet officially reported although it is found in the advance sheets of 319 Pac. Rep. (2d) 157.

JURISDICTION

The judgment of the Supreme Court of Montana became final on the denial of the petition for rehearing on December 4, 1957 (Department of Banking vs. Pink, 317 U.S. 264, 266), and the issuance of a writ of prohibition on December 10, 1957. (Appendix, p. 19-20). The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1257, Subdivision 3 in that the Court below in its opinion violated the provisions by taking of private property, without due process of law guaranteed by Subdivision 1 of the Fourteenth Amendment of the Constitution of the United States.

QUESTION PRESENTED

The opinion of the Supreme Court of Montana deprives the petitioner Sanborn of his real property, by not making him a party to the proceeding, without the issuance of any process or notice directed to him and without the service of any notice or process upon him and did not permit the reception of any evidence under the verified answer filed in the court raising issues of fact by denials of allegations in the application and pleading affirmative new matter.

STATEMENT

The respondent on March 2, 1957, filed his petition for a writ of supervisory control or other appropriate writ originally in the Supreme Court of the State of Montana. Thereafter the petitioner Fall, pursuant to an order to show cause issued on March 8, 1957, filed his duly verified return on March 18, 1957. Thereupon, the case was then heard on March 20, 1957, without requiring the relator therein to offer any proof in support of his petition and without affording the respondent therein any opportunity to offer evidence in support of the return.

Thereafter, on June 24, 1957, the Supreme Court rendered its opinion to which the respondent therein filed his petition for rehearing (Appendix, p. 12), which petition for rehearing was granted on July 22, 1957, and thereafter the proceedings were had as hereinabove set forth.

The petition for a writ filed in the Supreme Court of Montana sought to annul certain orders in the case of Sanborn vs. Johnstone in the District Court of the First Judicial District of the State of Montana. Therein the following proceedings had transpired:

The petitioner Sanborn had instituted an action in the District Court of the First Judicial District of the State of Montana to quiet title to real property, naming Johnstone as a party defendant and seeking to set aside a tax deed to Johnstone. This action was tried and a judgment rendered in the lower Court quieting the title in Johnstone, respondent herein.

An appeal was perfected to the Supreme Court of Montana and the judgment reversed, 113 Mont. 1, 120 Pac. (2d) 567. The Supreme Court of Montana required that the deposit in the sum of $1,213.41 to reimburse taxes paid, be delivered to Johnstone and made no further order. The remittitur in that case was filed on April 17, 1942, and an appropriate minute entry entered in the office of the Clerk of the District Court in conformity with the judgment of the Supreme Court pursuant to the provisions of Section 93-8025, Revised Codes of Montana, 1957. This was a final judgment, Woodard vs. Perkins, 119 Mont. 11, 171 Pac. (2d) 992, and vested the title in the lands in Sanborn. Therefater, on the 23rd day of May, 1944, the then Judge of the District Court of the First Judicial District of Montana, after the filing of the remittitur and without any notice to the petitioner Sanborn, proceeded to enter an order on the application of the respondent herein requiring the petitioner Sanborn to deposit $2,041.29 as additional taxes for the benefit of the respondent herein and gave the petitioner Sanborn the right to deposit such amount on or before June 20, 1944, otherwise a judgment would be entered quieting the title to the lands and premises in Johnstone, respondent herein.

That thereafter on June 8, 1944, the petitioner Sanborn filed a petition to vacate the order for a deposit of the additional funds in the sum of $2,041.29.

No further proceedings were had in the District Court of Lewis and Clark County until an amended petition was

filed January 11, 1957, seeking the vacation of the order for an additional deposit.

In the meantime, the respondent Johnstone had on November 23, 1954, filed a motion to dismiss the action. All of said motions and petitions came on for hearing before the petitioner Fall who, on the 11th day of January 1957, set aside the order of the District Court made on the 25th day of May, 1944, as being without jurisdiction. Thereupon proceedings were had in the Supreme Court of Montana as hereinabove set forth.

THE PROCEDURE

Under Montana law a writ of prohibition may be issued by the Supreme Court, Sec. 93-9202, R.C.M. 1947, and under Section 93-9204 R.C.M. 1947, and Section 93-9106, R.C.M., 1947, the respondent in such aproceeding may show cause by answer under oath which was done in this instance. A jury trial is contemplated if desired, as to questions of fact, Section 93-9107, R.C.M., 1947.

Issues of fact were raised by the answer to the petition (Appendix, p. 13-18).

THE PARTIES

In the Supreme Court the respondent herein was the relator, the District Court of the First Judicial District and Judge Fall were among the parties defendant. The petitioner Sanborn was not a party although affected by the final judgment of the Supreme Court. The petitioner

Sanborn here having the right to intervene is properly a petitioner in this proceeding. U. S. vs. Terminal R. Assoc. 236 U.S. 194, 199.

THE QUESTION OF DUE PROCESS WAS TIMELY RAISED

The question of due process was raised by the petition for rehearing to the first opinion of the Court (Appendix, p. 12) which was granted and discussed in the final opinion of the Court (Appendix, p. 13).

DUE PROCESS WAS DENIED

The Supreme Court of Montana attempted to adjudicate the rights of Sanborn in a case which had already been adjudicated without issuing any process or serving the same upon Sanborn and rendered a judgment affecting his rights in the absence of process or an appearance. Such a judgment is invalid. Clark vs. Wells, 203 U.S. 164, 170-171. No notice was given in any manner which was calculated to apprise Sanborn that his rights were to be adjudicated. Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 314.

The attempt of the Supreme Court to hold that the mere fact that the same counsel appeared in the proceeding in the District Court of the First Judicial District, likewise appeared for the respondent in the Supreme Court, is insufficient to be the equivalent of the service of process upon the petitioner Sanborn. Covey v. Town of Somers, 351 U.S. 141, 146.

The conduct of the Supreme Court of Montana after issues of fact were raised (Appendix, p. 13-18), in failing to hear testimony on such issues violates the fundamental principles of due process. Baltimore & Ohio Railroad Co. vs. U.S., 298 U.S. 349, 368-369.

CONCLUSION

It is clear that the due process clause of the Constitution was clearly violated in two respects:

(1) The Supreme Court of Montana attempted to adjudicate rights without any semblance of process, and

(2) failed to receive testimony upon questions of fact put in issue by the pleadings.

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION BELOW

No. 9792

STATE OF MONTANA ex. rel.,
ALEXANDER B. JOHNSTONE,
Relator,

vs.

DISTRICT COURT, LEWIS & CLARK COUNTY, et. al., *Respondents*

Submitted: Sept. 10, 1957
Decided: Nov. 14, 1957

Mr. Justice Angstman delivered the Opinion of the Court.

Relator seeks an appropriate writ to annul certain orders made by respondent court on January 11, 1957, and to prohibit respondents from further proceeding in district court cause No. 16386 except to enter judgment quieting title in favor of relator or to dismiss the action.

This court issued an order to show cause. On the return day, respondents filed a return and the matter was heard by this court.

The controversy arises out of proceedings in respondent court arising subsequent to the decision of this court in Sanborn v. Lewis & Clark County, 113 Mont. 1, 120 Pac. (2d) 567, being an action questioning tax title proceedings.

The petition shows that after the decision in that case, which was decided on October 2, 1941, and the rehearing denied January 3, 1942, the respondent court, the Hon-

orable Antone J. Horsky presiding, entered an order on May 25, 1944, in conformity with this court's opinion requiring Sanborn to pay to Johnstone the sum of $1,213.41 theretofore deposited in respondent court for taxes, purchase price payments and improvements made by Johnstone before the trial of the action in respondent court and in addition the sum of $2,041.29, being additional taxes and payments made by Johnstone to the county after the case was tried in respondent court and before the order was made.

That order recited that "if said plaintiff shall refuse and does not deposit said sum with the Clerk of the Court by June 20, 1944, this Court will enter judgment in accordance with the above-mentioned section [being 2214, Rev. Codes of 1935, now R.C.M. 1947, §84-4158] quieting title in the defendant, Alexander B. Johnstone and against the plaintiff and will thereupon order the return of the present and existing deposit of $1,213.41 to be paid by the Clerk of the Court to said plaintiff, provided further that if said plaintiff deposits the sum of $2,041.29 with the Clerk of the Court by June 20, 1944, then this Court will enter judgment quieting title in the plaintiff, Bruce W. Sanborn and will order the original deposit of $1,213.41 plus the current deposit of $2,041.29, making a total of $3,254.70 to be paid to the defendant, Alexander B. Johnstone as provided by Section 2214."

On June 8, 1944, Sanborn filed a motion to vacate and set aside the order of Judge Horsky upon the ground that it was made without notice to Sanborn or opportunity for a hearing and that it made no allowance to Sanborn for reasonable rental during the pendency of the action.

So far as the record shows there was no order made

or applied for extending the time for the payments to be made "by June 20, 1944."

This motion to set aside the order of Judge Horsky was not brought on for hearing until January 11, 1957. When it was brought on for hearing Johnstone filed a motion to dismiss the cause for failure of Sanborn to comply with Judge Horsky's order of May 25, 1944, and for laches in prosecuting the cause. This motion was overruled and Sanborn's motion to set aside the order of Judge Horsky was sustained and Sanborn was directed to prepare and file a petition or claim for rentals and other offsets that he might claim to be owing him from Johnstone as against Johnstone's claim under R.C.M. 1947, §84-4158.

Sanborn thereafter filed a petition for rentals which respondent court threatens to hear and consider. This petition claims rental of $500 per year, and a cost item of $211.41 which cost item was not objected to by Johnstone.

Relator questions the propriety of the order made by Judge Fall denying relator's motion to dismiss cause No. 16386, the order vacating the order of Judge Horsky and the order allowing Sanborn the privilege of filing a petition for rentals and other offsets.

The respondents in this proceeding have filed a return and answer to relator's petition. They contend that it raises questions of fact which must be resolved before the legal questions can be considered. Relator takes the view that no material fact questions are presented and that the legal questions are solvable on the record as made and on the uncontroverted facts. We agree with relator on this point.

The proceeding questions the right of Judge Fall to

set aside Judge Horsky's order and to deny Johnstone's motion to dismiss the action.

Judge Horsky made the order pursuant to the mandate of this court. It ordered the deposit of $1,213.41, which deposit was upheld by this court, to be paid to Johnstone and then provided for an additional payment of $2,041.29, which the order recited was for the following purposes: $856.65 subsequent taxes and $1,182.64 subsequent payments made by Johnstone to the county on the contract of purchase.

R.C.M. 1947, §84-4158, expressly authorizes the court to require the deposit of such additional taxes. It provides in part: "In the final judgment the court shall also determine the rights growing out of any additional taxes on said property accruing or being paid by either party during the pendency of said suit and, in said suit, the court shall have complete jurisdiction to fix the amount of taxes which should have been paid and to determine all questions necessary in granting full relief, including the power, in appropriate cases to order any assessor or other tax officer to make and certify to the court a corrected or new assessment or to do any other act or thing necessary to enable the court to do complete justice in the premises. Errors may be reviewed on appeal from the final judgment."

This court has expressly held that the purchaser from the county is entitled to have the order requiring a deposit to include all installment payments made to the county on the purchase price. Shull v. Lewis & Clark County, 92 Mont. 408-420, 19 Pac. (2d) 901, and see Larson v. Peppard, 38 Mont. 128, 99 Pac. 136, 129 Am. St. Rep. 630. Counsel for Sanborn do not question the right to add these amounts but assert that they may not be added without the right to offset rents, without notice to Sanborn,

which they allege was not given. It is questionable whether the want of notice would invalidate the order in its entirety, where as here part of it was valid and in conformity with the opinion of this court, and where as to some of the other items they were easily ascertainable or a matter of record and no showing was made that they were erroneous or that a different result would, should or could have been reached had notice been given.

Whatever may be the rule in that regard it is our view that the court acted without power and authority in setting aside the order of Judge Horsky some 12 years after the order was made, and in the face of a pending motion to dismiss the action for laches in its prosecution.

It has long been recognized that the courts have authority to dismiss an action for lack of diligence in its prosecution. State Savings Bank v. Albertson, 39 Mont. 414, 102 P. 692. This is the rule throughout the country. 27 C.J.S., Dismissal and Nonsuit, §65, p. 230; 30 C.J.S., Equity, §115, p. 530.

Here the motion of Sanborn to set aside the order of Judge Horsky was not brought on for hearing until after the lapse of more than 12 years after it was filed. Courts have held a plaintiff guilty of laches in failing to prosecute his action with a reasonable diligence on much shorter delay than that here. A few of the many cases so holding are the following: Raine v. Ennor, 39 Nev. 365, 158 P. 133 (nine years); Phillips v. Santa Ana Times, 18 Cal. App. 2d 280, 63 P. 2d 838 (three years); Congdon v. Aumiller, 79 Wash. 616, 140 P. 912 (seven years); Beaudette v. City (Tex. Civ. App.), 247 S.W. 895 (eight years); Lowe v. Ring, 151 Wis. 664, 139 N.W. 429 (five years); McGurren v. Noyes Bros. & Cutler, 65 N.D. 146, 256 N.W. 649 (five years); Hurley v. Farnsworth, 115 Me. 321, 93A.

821 (five years); Wilensky v. Philadelphia Casualty Co., 131 N.Y.S. 549 (less than seven years).

It is contended that if Sanborn was guilty of laches so was Johnstone. This contention is without merit for the courts hold that while defendant has the right to call a motion of plaintiff on for hearing it is not his obligation to do so, but the obligation to prosecute the action with diligence rests with the plaintiff. Thus in Congdon v. Aumiller, supra, the court said: "It seems consonant with reason that a plaintiff who hales a defendant into court assumes and, so long as he has the affirmative of the main issue, retains the duty of diligent prosecution. Neff v. Neff, 32 Wash. 82, 72 P. 1011; Arthur v. Washington Water Power Co., 42 Wash. 431, 85 P. 28; Rehmke v. Fogarty, 57 Wash. 412, 107 P. 184. As said by the Supreme Court of California in a case also closely analogous to this:

" 'But it is said that it was not the duty of the appellants to have urged the hearing of the demurrer; that this should have been done by the respondents, who filed it; and hence that the court was wrong in assuming that the laches of the appellants justified a dismissal of the action. The appellants brought the action; it would seem that upon them rested the burden of prosecuting it to a finality, and that as a step in that direction, from the facts then appearing to the court, they should have taken measures to have the demurrers determined, so that the action could progress'." A number of cases are then cited to support the statement.

In Hayward Lumber & Investment Co. v. Greenwalt, 215 Cal. 655, 12 Pac. (2d) 445, the court in treating of a like contention said: "The fact that certain demurrers to the complaint remained undisposed of does not suggest a different conclusion. It is well settled that 'while a defend-

ant may bring about a trial of the issue presented by his demurrer, is is the duty of the plaintiff to take measures to have the demurrer determined. It is incumbent upon plaintiff to use due diligence in this respect and failure to do so is ground for dismissal of the action.' Mowry v. Weisenhorn, 137 Cal. 110, 69 P. 971; Prudential Ins. Co. v. Superior Court, 117 Cal. App. 528, 4 Pac. (2d) 294; 21 Cal. Jur., p. 115, §74."

In Washington, dismissal for want of prosecution was provided for by rule of court and in State ex rel. Washington Water Power Co. v. Superior Court, 41 Wash. 2d 484, 250 Pac. (2d) 536, the court said: "The obligation of going forward to escape the operation of the rule always belongs to the plaintiff (or cross-complainant) and not to the defendant."

In Emmco Ins. Co. v. Walker, 57 N.M. 525, 260 Pac. (2d) 712, the court said: "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination. * * *"

To the same effect are United States v. Pacific Fruit & Produce Co., 138 Fed. 2d 367, and Inderbitzen v. Lane Hospital, 17 Cal. App. 2d 003, 61 Pac. (2d) 514.

In Price v. Sunfield, 57 Ariz. 142, 112 Pac. (2d) 210, the court stated the applicable rule as follows: "The general rule is that it is the duty of the plaintiff to see that his case is brought up for trial within a reasonable time. While it is true that a defendant may, if he desires, call a case up for setting when it is at issue, he is not obliged to do so, and his failure does not excuse the plaintiff from the responsibility of seeing that the case is set for trial, under penalty of a dismissal. Clearly plaintiffs were responsible for the long delay."

The Price case also pointed out the prejudice to defendant in a case very similar to this by saying: "The next question is, were the substantial rights of the defendants prejudiced by the delay? Their counsel set up in their brief many reasons why this is so, but we think we need consider only one. If the case had been properly urged for trial by plaintiffs, it would in the ordinary course of affairs have been heard and determined some time in the year 1935. At that time the liability of defendants, if any, would have been definitely fixed and they could have acted accordingly. If, however, plaintiffs may now proceed with the action and recover therein, defendants may be required to pay between four and five years' rent which they would not have been liable for had the matter been determined within a reasonable time. Plaintiffs say the rent of the premises was reasonably worth $100 per month. If that be true, the delay in trial, assuming that plaintiffs recovered on their complaint, would cost the defendants at least four or five thousand dollars more than they would have been compelled to pay had the case been tried with reasonable promptitude."

Plaintiff Sanborn is endeavoring according to his petition filed on January 25, 1957, to recover $500 per year rental since September, 1937.

In Sanborn v. Lewis & Clark County, supra, this court discussed and determined the question of the deposit required of plaintiff Sanborn. The court stated: "Also it is contended that the rental value of the premises during the period of occupancy since the issuance of the tax deed should be deducted from the amount allowed. * * *

"* * * Respondents made proof of items totaling the larger sum of $2,698.75 as claimed. The findings do not show how the court arrived at the lesser sum of $711.86,

and it cannot be determined therefrom whether improvements required under the lease, or the rental value of the premises, were taken into account. There was no request for specific findings showing allowances and deductions made so as to reserve those questions for review, and we find nothing in the record, and upon the issues as made, which would justify this court in disturbing the finding of the trial court upon this point in the case." This proceeding is an attempt to relitigate that question at least in part by asserting an offset for rentals for the period of time considered by this court in that action.

The matter may not be permitted to slumber for more than 12 years during which time Johnstone occupied the premises and during which time the claim for rentals multiplied.

We realize that ordinarily whether an action should be dismissed for want of diligence in its prosecution is a question that rests in the discretion of the court. However, here there were no facts asserted that tend in any way to furnish an excuse for the delay and hence there was nothing to move the discretion of the court. True the motion was filed in June, 1944, and Sanborn asserts that he made frequent demand upon Johnstone for possession of the land, but this does not show an excuse for not bringing the motion on for hearing.

For the unconscionable delay by plaintiff Sanborn in bringing his motion on for hearing for more than 12 years after it was filed, it must be held that he is, and has been, guilty of such laches as to bar relief and the court was in error in not sustaining Johnstone's motion to dismiss the action. It should have granted the motion with prejudice.

It is contended by counsel for respondents that the re-

sult of this opinion is to take from Sanborn his property without due process of law since he is not a party to this proceeding, and has had no notice or opportunity to be heard. There is no merit in this contention. He was the party who sought and obtained the orders in respondent court that were brought here for review in this proceeding. His counsel in those proceedings are here endeavoring to uphold the action of respondent court.

"* * * due process in the appellate courts may consist of any proceeding in keeping with the general and established principles of judicial procedure." 16A C.J.S., Constitutional Law, §626, pp. 844, 847.

Our reports are replete with cases showing that the established procedure for special proceedings designed to review orders or judgments of the district courts is for the court to be named as defendant or respondent, and for counsel representing the party interested in upholding the order or judgment of the court to appear for the court though actually representing his client, the party interested in upholding the court's order or judgment.

The situation is comparable to cases involving appeals from orders or judgments. Notices of appeal and of subsequent proceedings go to counsel and not to the parties.

Our research has disclosed but one case where this same contention was made in a proceeding where the court and not the party interested was named as defendant or respondent, and it reached the same conclusion which we have. Morse v. District Court, 65 Nev. 275, 195 Pac. (2d) 199.

Counsel for respondents contend also that if this opinion stands, the question arises as to whether it may be pleaded as *res adjudicata* in another action brought by

Johnstone against Sanborn and which is pending in respondent court and which seeks to quiet title to the same lands.

We shall not undertake to dispose of that question here other than to state that whether this opinion may be pleaded or relied on as *res adjudicata* in that action does not affect our duty to decide the issues here presented as we see them.

Let a writ of prohibition issue prohibiting respondent court from further proceeding with cause No. 16386 other than to dismiss the same for want of diligent prosecution.

* * * *

Mr. Justice Adair:

I dissent and reserve right to file such dissent later.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, ex rel
ALEXANDER B. JOHNSTONE, *Relator*

vs.

DISTRICT COURT, LEWIS & CLARK
COUNTY, et. al., *Respondents.*

PETITION FOR REHEARING

Comes now the respondent and moves this Court for a rehearing of said cause upon the following grounds and for the following reasons, to-wit:

That this Honorable Court has overlooked controlling facts in arriving at its decision.

That this Court has overlooked controlling statutes and decisions not previously invited to the attention of this Court.

That the effect of this judgment and decision as pronounced by this Honorable Court on the 24th day of June, 1957, results in the taking of private property without due process of law as guaranteed by subdivision 1 of the Fourteenth Amendment to the Constitution of the United States and Section 25 of Article III of the Constitution of the State of Montana.

Dated this 2nd day of July, 1957.

CHAS. N. DAVIDSON,
RALPH J. ANDERSON,
STANLEY P. SORENSON.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, ex. rel.,
ALEXANDER B. JOHNSTONE, *Relator,*

vs.

DISTRICT COURT, LEWIS &
CLARK COUNTY, et. al., *Respondents.*

ORDER

Respondents' petition for rehearing herein is hereby denied.

Done this 3rd day of December, 1957.

JAMES T. HARRISON,
Chief Justice,
WESLEY CASTLES,
ALBERT H. ANGSTMAN,
Associate Justices.

Filed Dec. 4, 1957.
Edna J. Hinman, *Clerk of Supreme Court,*
State of Montana

APPLICATION OF RELATOR

I.

That during the years 1930 to 1935, inclusive, Bruce W. Sanborn was the owner of certain lands and real estate situated in the northern part of Lewis and Clark County, Montana, and including the following, to-wit:

> All of Section Two (2); the Southeast Quarter (SE ¼) of Section Three (3; the Northwest Quarter

NW)¼; North Half of the Northeast Quarter (N½NE¼) and the West Half of the Southwest Quarter (W¼SW½) of Section Eleven (11) all in Township Nineteen (19) North, Range Five (5) West;

And that during said years of 1930 to 1935 said Bruce W. Sanborn failed and neglected to pay the taxes upon said property and premises, or any thereof; and, as result of such default and delinquency in the payment of said taxes, the County of Lewis and Clark, Montana, did, on the 31st day of December, 1935, take a tax deed to said property and premises and all thereof, under and by virtue of which the title to said property and premises and all thereof was transferred and conveyed unto said Lewis and Clark County; that subsequently, and on or about the 26th day of February, 1936, the relator, Alexander B. Johnstone, entered into a contract with said Lewis and Clark County for the purchase of said above described property and premises and all thereof, a copy of said contract being hereto attached marked Exhibit "A" and by this reference made a part hereof; and that under and by virtue of said contract the said relator, Alexander B. Johnstone, did then and there enter into and upon possession of said above described property and premises and all thereof; and that ever since said time, and up to the present date, said relator has continued in sole and exclusive possession of said property and premises and all thereof; and ever since said time and up to the present date the record title to said premises has been in your petitioner, Alexander B. Johnstone, according to the records of Lewis and Clark County, Montana, and said premises have been listed and carried on the records of the County Assessor of Lewis and Clark County, Montana, in the name of your petitioner and all taxes, state and local, have been, during all of said

time, assessed, levied and charged against said premises in the name of your petitioner; and petitioner has paid all taxes levied or assessed upon or against the same for the entire period from the date of said aforementioned contract of purchase up to the present time.

That thereafter, on or about May 11, 1940, (and during the pendency of the litigation hereinafter mentioned) said relator, Alexander B. Johnstone, completed payment of the full purchase price as specified in said contract (Exhibit "A" hereto attached) and thereupon a deed was duly executed and delivered to him by said Lewis and Clark County, conveying full and absolute legal title to the above described property and premises, and all thereof, to said Alexander B. Johnstone; and that ever since said time he, said Alexander B. Johnstone, has been, and still is, the legal owner of said property, and all thereof; and that during all of said times and ever since the 26th day of February, 1936, said relator, Alexander B. Johnstone, has been, and still is, in open, notorious, sole and exclusive possession of said property and all thereof; and that during all of said time, (February, 1936, to date hereof; said relator, Alexander B. Johnstone, has paid all state, county or local taxes that have been levied or assessed upon or against said property, and all thereof. (Paragraph No. 1 of Respondent's Return).

I.

Answering paragraph numbered I of said petition, respondents admit that portion thereof commencing with Line 18 on page 1 of said petition to the semi-colon on Line 3 of page 2 of said petition; admit that the relator, Alexander B. Johnstone, entered into a contract with Lewis and Clark County for the purchase of the above described property and premises; allege that they have no knowl-

edge or information sufficient to form a belief as to whether or not Exhibit "A" attached to the said petition is a true and correct copy of said contract and therefore deny the said allegation; deny that Alexander B. Johnstone entered into and upon possession of the property described in said petition under and by virtue of said contract and in this connection allege that the petitioner, Alexander B. Johnstone, had been in possession of said property since on or about the 4th day of April, 1933, as lessee under a lease wherein the owner of said property, Bruce W. Sanborn, was lessor, which said lease was for a term of six years; admit that ever since said time, the said Alexander B. Johnstone has continued in sole and exclusive possession of said property and in this connection allege that the said Bruce W. Sanborn, the owner of said property has made frequent demand upon the said Alexander B. Johnstone for possession thereof as hereinafter alleged but that said Alexander B. Johnstone has failed and refused to surrender possession of said property to the said Bruce W. Sanborn. Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that ever since said time and up to the present date the record title to said premises has been in the petitioner, Alexander B. Johnstone, according to the records of Lewis and Clark County, Montana, and that said premises have been listed and carried on the records of the County Assessor of Lewis and Clark County, Montana, in the name of the petitioner and that all taxes, state and local, have been during all of said time assessed, levied and charged against said premises in the name of petitioner and therefore deny the said allegations. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegation that petitioner has paid all taxes levied or assessed upon or against the same for the entire period

from the date of said contract up to the present time and therefore deny the said allegation and in this connection respondents allege that if said relator has, in fact, made further payments of taxes since the date of the decision of this Court hereinafter mentioned and mentioned in paragraph VI at page 5 of said petition that petitioner made such payments with full knowledge of the rights, claims and demands of the said Bruce W. Sanborn and that such payment of taxes has been without any right and that as to such payments the petitioner is a volunteer.

Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that on or about May 11, 1940, (and during the pendency of the litigation thereinafter in said petition mentioned) the relator, Alexander B. Johnstone completed payment of the full purchase price as specified in said contract (Exhibit "A" attached to said petition) and thereupon a deed was duly executed and delivered to him by said Lewis and Clark County conveying full and absolute legal title to the above described property and premises and all thereof to said Alexander B. Johnstone and therefore deny the said allegation and in this connection respondents allege that if such a deed was in fact executed and delivered to the relator by said Lewis and Clark County the said deed is and was void and of no force or effect and conveyed no title whatsoever by reason of the facts hereinafter alleged. Deny the allegation that ever since said time the said Alexander B. Johnstone has been and still is the legal owner of said property and all thereof and in this connection respondents allege that said Bruce W. Sanborn is now and at all times mentioned in said petition and herein was the legal owner of said property and all thereof. Deny that during all of said times and ever since the 26th day of February, 1936, the relator, Alexander B.

Johnstone, has been and still is in open, notorious, sole and exclusive possession of said property and all thereof. Deny that respondents have any knowledge or information sufficient to form a belief as to the truth of the allegation that during all of said time (Feb. 1936, to date) said relator has paid to said county the local taxes levied or assessed upon or against said property and all thereof and therefore deny the said allegation.

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 9792

STATE OF MONTANA, on the relation of
ALEXANDER B. JOHNSTONE, *Relator,*

vs.

THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUTNY OF LEWIS AND CLARK, THE HONORABLE VICTOR H. FALL, once presiding Judge, and THE HONORABLE LESTER H. LOBLE, now presiding Judge, *Respondents.*

Filed Dec. 10, 1957.
Edna J. Hinman, *Clerk of Supreme Court,*
State of Montana.

ORDER GRANTING PEREMPTORY WRIT OF PROHIBITION

WHEREAS, upon the verified application of the above named relator, this Supreme Court has heretofore issued an order to show cause why an appropriate writ should not be issued to prohibit respondents from further proceedings in the Distrit Court of the First Judicial District of the State of Montana, In and for the County of Lewis and Clark in Cause No. 16386 therein, except to enter judgment quieting title in favor of relator, or dismissing said Cause No. 16386; and

WHEREAS, pursuant to the aforesaid verified application and upon the hearing and re-hearing, of said order

to show cause so issued in the above entitled matter, it appearing to this Supreme Court that the responding court should be prohibited from further proceeding with Cause No. 16386, other than to dismiss the same for want of diligent prosecution;

IT IS HEREBY ORDERED that a peremptory writ of prohibition in due form of law be issued out of and under the seal of this Supreme Court, addressed to the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and to the Honorable Lester H. Loble, the now presiding Judge, and to the Honorable Victor H. Fall, once presiding Judge, commanding that the said respondents be prohibited and desist from any further proceedings in Cause No. 16386, other than to dismiss the same as hereinafter provided; and,

IT IS FURTHER ORDERED that the said writ command that the now presiding Judge in said Cause No. 16386 of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, enter judgment in said Cause dismissing the same for want of diligent prosecution.

Done this 10th day of December, 1957.

JAMES T. HARRISON,
Chief Justice,
WESLEY CASTLES,
ALBERT H. ANGSTMAN,
Associate Justices.